

DECLARATION


Lewis I. Cohen hereby declares under penalty of perjury that the following is true:

On June 7, 1991 I attempted to review the files in the Office of the Prothonotary in the Court of Common Pleas in Pittsburgh, Pennsylvania of the following two actions: G.D. 88-02730 and G.D. 89-22010. As part of the file there was included an envelope which was sealed. I asked an employee of the Clerk's Office named Terry Sands whether I could review the contents of the envelope. Mr. Sands checked with another person, and then opened the envelope for me and handed me the transcript of the May 24, 1991 hearing before Judge John L. Musmanno. I asked Mr. Sands if I could xerox the transcript. He told me that was not permitted, but that I could make whatever notes I wanted of the transcript. I then copied the transcript verbatim except for that portion dealing with mutual releases. Attached hereto is a typewritten copy of the text from those verbatim notes.

Prior to the sealing of the record ordered at the settlement conference, I had inspected the record and obtained copies of a number of documents, including the Amended Complaint in GD88-02730; the Complaint and Amended Complaint in GD89-22010; the jury verdict in GD88-02730 and accompanying Interrogatories; the Court's August 17, 1990 Order disposing of Defendants' Motion For

Post Trial Relief; the transcript of a February 13, 1990 trial session in which jury charges were given; and a portion of the trial transcript indexing the testimony and exhibits contained in the record. I did not obtain copies of such testimony or exhibits since I assumed that they were part of a public record that would still be available at such time as any documents became necessary.

26 JUNE 1991
DATE


Lewis I. Cohen

Transcript of May 24, 1991 11:30 a.m.
Hearing in Chambers

The Court:

Let the record reflect that we are in Chambers, that we have been discussing settlement, and the case has been resolved.

Present in Court are the plaintiff, with her counsel Howard Louik, the defendant's counsel, Terrance Murphy, Allan Andrascik, Edward Meyers, General Manager of WBZZ and Allan Box, President of EZ Communications.

Both sides have agreed that the amount of settlement will be absolutely confidential. It will not be discussed in any sort of range, whether it be one figure, two figures or 50 figures.

There will be no inkling whatsoever of the range of the settlement other than the parties are permitted to say to anybody that the case was amicably resolved. Both parties are pleased with the settlement. It ends many years of potential litigation. Other than that they will say nothing about it.

The plaintiffs will settle and discontinue the present action G.D. 89-22010.

The plaintiff will also settle and discontinue the prior action G.D. 88-02730.

Further, that this settlement encompasses the plaintiff withdrawing their letter of inquiry with the FCC.

Further, the plaintiff agrees that she will not file a complaint with the FCC. She will not assist

anybody in filing a complaint with the FCC. She will in no way directly or indirectly assist anybody in filing a complaint.

Further, should she be subpoenaed, in the unlikely event some party that we don't know about files a complaint, she will refuse to testify on the grounds that the Court Order in this present case prohibits her; and, it is understood that if that Order doesn't prevent her, that that will not be a violation of this agreement.

In other words, she will go as far as refusing to testify and saying that you'll have to get approval from Judge Musmanno who will not give approval. If somehow I'm overruled by some higher court, then understand that that's not a breach of the agreement. She has given her assurance that she will not do anything voluntarily in any way to cause you a problem with the FCC. I mean I don't know how much broader I can make it other than that.

The Court:

Further, the parties agree that the record on appeal at G.D. 88-02730, the parties agree that the entire record will be sealed by Court Order, including transcripts of testimony, any pleadings, documents filed, any briefs, letters that were attached as exhibits to those briefs or records. All will be sealed by Court Order.

[There follows a discussion concerning the
Court's Order concerning mutual releases.]

The Court:

The parties further agree that as part of the agreement they intend to execute, that there will be a mutual non-disparagement clause and.....

Mr. Kamin:

A statement in the release that the objected to conduct by Ms. Randolph was not that of management but that of co-workers or co-employees.

The Court:

An essential consideration of this settlement agreement is the need for confidentiality on both sides. Accordingly, it's to be understood by both parties should there be any breach of the confidentiality provisions, that the Court will then entertain a contempt action against the breaching party. In other words, any breach of this agreement will involve a contempt citation.

Mr. Kamin:

Defendants will pay record costs.

The Court:

All the parties were present during the discussion of the terms, and for the record Ms. Randolph, do you agree to the settlement?

Ms. Randolph:

Yes, I do.

The Court:

Mr. Louik?

Mr. Louik:

I do.

The Court:

Mr. Kamin?

Mr. Kamin:

Yes sir.

The Court:

On behalf of the defendant Mr. Box, the President,
do you agree?

Mr. Box:

Yes, I do.

The Court:

Mr. Meyer, do you agree?

Mr. Meyer:

Yes.

The Court:

Mr. Murphy?

Mr. Murphy:

I do.

The Court:

Mr. Andrascik?

Mr. Andrascik:

I do.



NEWS

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, D.C. 20554

ATTACHMENT E

News media information 202 / 632-5050
Recorded listing of releases and texts
202 / 632-0002

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC 515 F.2d 385 (D.C. Cir. 1975).

13022

Report No. GN-73

GENERAL ACTION

May 9, 1991

FCC MODIFIES 1990 POLICY STATEMENT AND ORDER CONCERNING CHARACTER QUALIFICATIONS OF BROADCAST LICENSEES/PERMITTEES

The Commission has modified its 1990 Policy Statement and Order regarding character qualifications of broadcast licensees and permittees by easing the reporting burden imposed on licensees, and clarifying the reporting requirement.

Under the amended rules, all broadcast permittees and licensees must report to the Commission any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on the permittee's or licensee's character qualifications and that would be reportable in connection with any application for renewal. Such reports must be filed within 90 days of the date the permittee or licensee becomes aware of any such reportable adverse findings or adverse final actions not previously reported to the Commission. Currently, licensees are required to file such reports within 30 days of the relevant adjudication. The Commission stated that permittees and licensees bear the obligation to make reasonable, good faith efforts to become knowledgeable of any such reportable adjudicated misconduct.

The Media Access Project (MAP) and Telecommunications Research and Action Center (TRAC) asked the Commission to further expand the range of relevant misconduct and the scope of matters that must be reported to include all civil judgments involving misrepresentation, whether or not the misrepresentation is made to a governmental unit. They also asked that the Commission consider convictions for non-serious as well as serious misdemeanors.

Additionally, Cronicle Broadcasting Co., Post-Newsweek Stations, Inc., The Providence Journal Company, Shenandoah Valley Educational Television Corporation, and the Spartan Radiocasting Company (Joint Petitioners) asked the Commission to ease the reporting burden imposed on licensees and to clarify the reporting requirements. Its request was granted, in part.

With respect to MAP and TRAC, the Commission declined to expand the reporting requirements of licensees. As to civil matters, the Commission expressed continued belief that judgments relating to fraudulent representations to a governmental unit or mass media related violations of antitrust or anticompetitive laws bear most directly on an applicant's qualification to be a broadcast licensee.

(over)

The Commission recognized that some civil misrepresentations not involving governmental units may be relevant to a broadcaster's character qualifications. However, the Commission said that based on its experience, the category of civil misrepresentation is too broad to be presumptively relevant to a broadcaster's qualifications. It may, however, consider such matters on a case-by-case-basis.

Action by the Commission May 1, 1991, by Memorandum Opinion and Order (FCC 91-146). Commissioners Sikes (Chairman), Quello, Marshall, Barrett, and Duggan.

-FCC-

News Media contact: Patricia A. Chew at (202) 632-5050.

CERTIFICATE OF SERVICE

I, Dana Chisholm, do hereby certify that on the 18th day of October 1993, a copy of the foregoing "Petition To Deny" was sent first-class mail, postage prepaid to the following:

Howard J. Braun, Esq.
Rosenman & Colin
1300-19th Street, N.W.
Washington, D.C. 20036

Rainer K. Kraus, Esq.
Herbert D. Miller, Jr., Esq.
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036


Dana Chisholm

**ATTACHMENT B TO
MOTION TO ENLARGE ISSUES**

STAMP & RETURN
Federal Communications Commission
Washington, D. C. 20554

KOTEEN & NAFTALIN
FILE COPY

MM/PM/146-006

IN RE APPLICATION OF

PITTSBURGH PARTNERS, L.P.
ASSIGNOR

EZ PITTSBURGH, INC.
ASSIGNEE

FM RADIO STATION WQKB,
NEW KENSINGTON, PA

File Number

BALH-930901GT

RECEIVED

OCT 22 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO PETITION TO DENY

EZ Pittsburgh, Inc. (EZ), the proposed assignee of the license of radio station WQKB(FM), in New Kensington, Pennsylvania, files herewith, by its attorneys, its Opposition to the Petition of Allegheny Communications Group, Inc. (Allegheny) seeking denial of the above captioned application.

I. Allegheny Lacks Standing to File the Present Petition to Deny.

Allegheny does not allege that any of its principals reside in or near New Kensington or that any of them listen to WQKB. Nor does Allegheny allege any economic or other cognizable interest in support of its claim to standing. Nor does Allegheny claim that it, or any of its principals, suffered injury on account of the substantive conduct alleged in the petition. Instead, Allegheny asserts that it has standing to file the instant petition on the sole ground that it is an applicant in MM Docket Number 93-88 for authority to construct a new FM station in Pittsburgh,

Pennsylvania, which application is mutually exclusive with the pending EZ application for renewal of the license of radio station WBZZ, in Pittsburgh.

Allegheny is a mere applicant, and the Commission has long, and consistently, held that mere status as an applicant is insufficient to confer standing, see, e.g., *Theodore Mallyck and Allaun Corp.*, 9 RR 2d 550 (1967); *WIBF Broadcasting Co.*, 16 RR 2d 263 (1969).¹ While citing no precedent whatever in support, Allegheny asserts the novel theory that the public interest finding necessary for grant of the present application "would injure Allegheny, which is contending in the renewal proceeding that EZ should be disqualified" (Allegheny petition, p. 2). Allegheny also contends that grant of the present application would, in some unspecified (and unclear) sense minimize any diversification demerit in MM Docket Number 93-88 predicated upon EZ's Local Marketing Agreement (LMA) with respect to WQKB.

Allegheny's lack of standing as a mere applicant is in no way remedied by its novel arguments that grant of the present application will in some amorphous and

¹ In *WIBF, Broadcasting Co., supra*, CATV franchisees opposed a television assignment application and alleged that they had standing to do so on the basis that the existing license had filed oppositions to their certification and other requests pending at the Commission. The Commission observed,

"In a sense, petitioners' status is akin to that of an applicant who seeks to participate in proceedings involving a facility other than the one he has applied for. It is established that a mere applicant does not have standing to participate in proceedings on another application on the basis of a claim that he is in competition. *Mansfield Journal Co. v. FCC*, 84 US DC 341, 173 F2d 656. The pendency of petitioners' CATV petitions before the Commission underscores the fact that petitioners are as yet only applicants." (16 RR 2d at 266, n. 2).

unspecified way affect it adversely as an applicant in MM Docket Number 93-88, see *WIBF, Broadcasting Co., supra*, fn 1.

II. Allegheny's Arguments Have Been Rejected

Although Allegheny nowhere acknowledges it, its present Petition is a repeat of its 1991 Petition to Deny the license renewal application of EZ station WBZZ, the identical allegations, documents, and arguments having been presented there. The present Allegheny petition adds absolutely nothing new. By *Hearing Designation Order* (DA 93-361) released on April 5, 1993, the Commission expressly rejected all of Allegheny's contentions. A copy of the *HDO* is provided as Attachment A to this Opposition.² In fact, Allegheny has asked the Presiding Administrative Law Judge in MM Docket Number 93-88 certify an appeal from the *HDO* to the Commission, and he has refused to do so (FCC 93M-218, released May 3, 1993). Allegheny followed with an unauthorized appeal from the *HDO*, which remains pending.

III. Allegheny's Contentions are Patently Lacking in Merit

EZ will not burden the record with a repetition of its showing that Allegheny's allegations are patently lacking in merit beyond supplying, in Attachment B to this Opposition, a copy of its 1991 Opposition to Allegheny's 1991 Petition to Deny. Suffice it to say that Allegheny's contentions have not gained merit with the passage of time.

² Allegheny goes far beyond failing to acknowledge that its contentions have been rejected, stating that "[t]o date the Commission has failed to consider the impact of this flagrant case on the qualifications of EZ" (Allegheny Petition, p. 6). This is false.

In view of the above, Allegheny's petition, filed without the benefit of standing and in the face of the earlier rejection of the specious arguments made here, must be dismissed or denied.

Respectfully submitted,

EZ Pittsburgh, Inc.


By /s/ Rainer K. Kraus 
Rainer K. Kraus


By /s/ Herbert D. Miller, Jr.
Herbert D. Miller, Jr.

KOTEN & NAFTALIN
SUITE 1000
1150 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036

Its attorneys

October 22, 1993

Attachment A

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-88

In re Applications of

EZ COMMUNICATIONS. File No. BRH-910401C2
INC.

For Renewal of License of FM
Radio Station WBZZ(FM) on
Channel 229B at
Pittsburgh, Pennsylvania

ALLEGHENY File No. RPH-910628MC
COMMUNICATIONS
GROUP, INC.

For a Construction Permit for a
New FM Broadcast Station on
Channel 229B at
Pittsburgh, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: March 26, 1993;

Released: April 5, 1993

By the Chief, Audio Services Division, Mass Media Bureau:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the application of EZ Communications, Inc. (EZ) for renewal of license of station WBZZ(FM), Pittsburgh, Pennsylvania; (b) the application of Allegheny Communications Group, Inc. (Allegheny) for a construction permit for a new FM station on Channel 229B at Pittsburgh, Pennsylvania; (c) a Petition to Deny the WBZZ(FM) license renewal application, filed June 28, 1991, by Allegheny; (d) an Opposition to Petition to Deny filed on July 29, 1991, by EZ; (e) a Reply to Opposition to Petition to Deny filed on August 19, 1992, by Allegheny; (f) a Petition to Dismiss or Deny filed on December 6, 1991, by EZ; (g) an Opposition to Petition to Dismiss or Deny filed on December 19, 1991, by Allegheny; (h) a Reply to Opposition to Petition to Dismiss or Deny filed by EZ on January 17, 1992; and (i) a Motion for Leave to Respond to Reply to Opposition to Petition to Deny filed on February 7, 1992, by Allegheny.

Allegheny's Petition to Deny

2. On June 28 1991, Allegheny filed a petition to deny EZ's renewal application for Station WBZZ(FM). Allegheny requests the specification of five issues relating to EZ's qualifications to be a Commission licensee. The five issues are all based on matters which were the subject of an arbitration proceeding and two civil suits involving WBZZ's former news director, Elizabeth Nelson Randolph.

Background

3. In the arbitration proceeding, an arbitrator sustained a grievance brought by the American Federation of Television and Radio Artists-Pittsburgh on Randolph's behalf alleging that Randolph had been wrongly discharged by EZ. The arbitrator's decision finds that from 1986 to 1988, while she was a newscaster for WBZZ, Randolph had been the subject of repeated insulting on-the-air remarks of a sexually provocative nature by two WBZZ announcers. The arbitrator determined that, after one such incident, Randolph became so distressed that she could not go on the air and left the station without completing her final news reporting segments.¹ After she left, WBZZ's general manager suspended the two announcers and instituted an investigation of the incident. When Randolph returned to work later that day, she was placed on leave of absence pending an investigation. Subsequently, based on her unauthorized failure to fulfill her on-air assignment, WBZZ terminated Randolph's employment. Ultimately, the arbitrator found that Randolph's walking off the job was reasonable, and awarded her severance benefits. An action instituted by EZ to vacate the award was denied (Civil Action 88-2636).

4. In addition to the grievance, Randolph filed a complaint against EZ and the two announcers in the Court of Common Pleas of Allegheny County. In her suit she sought damages for defamation, intentional infliction of emotional distress and invasion of privacy (Case No. GD88-02730). Randolph also filed a sex discrimination complaint with the Pennsylvania Human Relations Commission which resulted in the issuance of a right to sue letter. Randolph then commenced a second civil suit against EZ in the court of Common Pleas of Allegheny County (Case No. GD89-22010). On February 14, 1990, the jury, in case No. GD88-02730, awarded a verdict in favor of Randolph. While appeals on the jury trial were still pending, both cases (GD88-02730 and GD89-22010) were settled simultaneously by the parties. The settlement agreement provided that Randolph would not file or assist in the filing of a complaint with the FCC and that if called upon to testify concerning the subject matter of her law suits she will not on the ground that she is prohibited from doing so by court order.² By Order dated July 1, 1991, the judge in case No. GD88-02730, ordered the record sealed.³

News Distortion Issue

5. Based on the above record, Allegheny requests that a news distortion issue be specified against EZ. Allegheny contends that EZ's on-the-air report that Randolph, a "public figure," had engaged in sexual impropriety, constituted news. In its Opposition to Petition to Deny, EZ

¹ In this incident, an announcer from a station affiliated with WBZZ called in a "joke" about Randolph, which the arbitrator found "alludes to the performance of oral sex."

² By letter dated April 27, 1989, Randolph filed a complaint with the FCC's EEO Branch alleging sex discrimination. On

June 20, 1991, she requested withdrawal of her letter.

³ Before the record was ordered sealed, Counsel for Allegheny, on June 7, 1991, reviewed it and obtained information which Allegheny submits in support of its petition to deny.

points out that there is no evidence that the allegedly offensive remarks were made during newscasts or were ever intended to constitute news.

6. In *Hunger in America*, 20 FCC 2d 143, 151 (1969), the Commission found that "[r]igging or slanting the news is a most heinous act against the public interest...." Here, however, there is no evidence that the statements concerning Randolph were made in the context of a news broadcast or were intended to constitute news. Moreover, given the entertainment context of the statements, we do not believe that the listening public would construe the statement as news. Consequently, we will decline to add a news distortion issue.

Indecency Issue

7. Allegheny relies on a determination by the arbitrator that the nature of the material broadcast was "lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should be subjected to - even if they are part of an 'entertainment vehicle.'" to argue for the specification of an issue to determine whether WBZZ broadcast indecent material in violation of 18 U.S.C. Section 1464. Allegheny notes that the material was broadcast in the morning, a time period when children may be in the audience. *Cling, Great American TV and Radio Co., Inc.*, 66 RR 2d 1557 (Mass Media Bur. 1989). Allegheny also cites the court's holding in *Monroe Communications Corporation v. FCC*, 900 F.2d 351 (D.C. Cir. 1990) rejecting a Commission ruling that excluded the consideration of obscenity broadcasts in the renewal context.

8. The Commission has defined broadcast indecency as language or material that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Indecent programming contains sexual or excretory references that do not rise to the level of obscenity. As such, indecent material is protected by the First Amendment and cannot be banned entirely. It may, however, be restricted in order to avoid its broadcast during times of day when there is a reasonable risk that children may be in the audience. Consistent with existing court decisions in this area, the Commission currently prohibits the airing of indecent material between 6:00 a.m. and 8:00 p.m.⁴ See *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The Commission will act on all documented complaints of indecent or obscene broadcasting that it receives. Given the sensitive nature of the cases, it is important that the Commission be provided as full a record as possible to evaluate allegations of obscene or indecent programming. Consequently, the Commission requires (1) a tape, transcript, or significant excerpts of the program; (2) the date and time of the broadcast; and (3) the call sign of the station involved.

⁴ In its *Report and Order*, FCC 93-42, released January 22, 1993, the Commission adopted a rule to implement a Congressional mandate to prohibit the broadcast of indecent programming (a) between 6:00 a.m. and 10:00 p.m. by any public broadcast station that goes off the air at or before 12 midnight; and (b) between 6:00 a.m. and 12 midnight for any other radio station. The new hours were to become effective February 25, 1993. However, the D.C. Circuit Court of Appeals has stayed the effectiveness of the rule. See *Action for Children's Television v.*

9. We note that in the instant case, the Federal Communications Commission has received no complaints alleging the broadcast of indecent matter by WBZZ. Moreover, we note that neither the court nor the arbitrator reached a determination that the material broadcast by WBZZ was either obscene or indecent. The arbitrator and the court determinations were directed to the impact of the broadcast on an employee of the station and not to whether the matter broadcast was obscene or indecent.⁵ Moreover, Allegheny has not provided a tape, transcript or significant portion of the broadcast in question which would permit the Commission to make an independent determination that the broadcast matter was either obscene or indecent. Absent this documentation we are left to speculate as to the exact nature and context of the broadcast matter which distressed Randolph. As a final matter, even if we were to find that the "joke" itself was indecent, we would be disinclined to designate an issue against EZ based on an isolated incident which apparently was never repeated. This is especially so in light of the evidence that upon learning of the "joke," management took immediate action by suspending the announcers responsible and investigating the incident. Under these circumstances we will not specify an indecency issue.

Discrimination Issue

10. Allegheny also seeks an issue to determine whether EZ violated Section 73.2080(a) of the rules which provides that "no person shall be discriminated against in employment by such stations because of... sex." Allegheny contends that by subjecting Randolph to sexually oriented "banter," Randolph was compelled to assume the role of a stereotypical "bimbo" as a condition of her employment. In its Opposition, EZ points out that Randolph was paid to participate in an entertainment program and that her suit, based on remarks by her co-performers which were intended to be comedic, was a highly unusual claim for which there is little or no precedent. Finally, EZ notes that there is no basis for the requested issue because there has been no allegation that WBZZ's female and minority employment record was deficient.

11. A sex discrimination issue will not be specified. Section 73.2080 is designed to prevent discrimination by licensees on the basis of race, color, religion, national origin or sex in the recruiting, hiring and promoting of employees. Allegheny has not demonstrated any discrimination in recruiting, hiring or promoting of employees by EZ. Moreover, the matter on which Allegheny relies has been the subject of two lawsuits by Randolph. These lawsuits have been settled while appeals were still pending. Under this circumstance, we are disinclined to specify an issue. See, *Policy Regarding Character Qualifications in Broadcast Licensing (Policy Statement)*, 102 FCC 2d 1179, n.63 (1986), recon. granted in part, denied in part, 1 FCC

FCC, Case No. 93-1092, Order filed February 23, 1993.

⁵ In this regard we note that the arbitrator found that "The jokes and suggestive remarks that were directed to her [Randolph] were lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should have to be subjected to—even if they are part of an entertainment vehicle." *Award of Arbitrator*, (Case No. 55-300-0064-88) dated November 16, 1988, at page 12.

Federal Communications Commission

DA 93-361

Red 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987).

Civil Misrepresentation Issue

12. Allegheny contends that the Commission has recognized that "civil misrepresentations not involving governmental units may be relevant to a broadcaster's character qualifications." *Policy Statement, recon. granted in part*, 6 FCC Red 3448 (1991). Here, Allegheny contends, EZ broadcast a civil misrepresentation concerning Randolph to the general public. Consequently, Allegheny contends, an issue is warranted to determine the impact on EZ's character qualifications of the decision of the arbitrator and the adjudication in Case No. GD88-02730.

13. A civil misrepresentation issue will not be specified. In the Commission's *Policy Statement*, the Commission, after recognizing that "some civil misrepresentations ... may be relevant to a broadcaster's qualifications," stated that, "[n]evertheless, based on our experience, we believe that the category of civil misrepresentation is too broad to be presumptively relevant to a broadcaster's qualifications." (emphasis supplied) *Id.* The Commission also stated that it may consider such matters on a case-by-case basis. *Id.* In the instant case, where the litigation has ended in a settlement to the apparent satisfaction of the parties, further investigation of this matter is not warranted.⁶

Abuse of Process Issue

14. Finally, Allegheny contends that addition of an abuse of process issue is warranted because the settlement EZ entered into with Randolph was designed to obstruct inquiry by the Commission. In this regard, Allegheny notes, Randolph is obligated, under threat of contempt, to refuse to honor any subpoena that might be issued by the Commission and the record in the litigation has been sealed. Allegheny points out that the settlement followed soon after the release of the Commission's reconsideration of its *Policy Statement*. According to Allegheny, the reconsideration created uncertainty as to whether the Commission would view the defamation action as a relevant FCC matter. Thus, Allegheny concludes, the settlement was an effort to preclude FCC scrutiny. It is well settled, Allegheny states, that it is an abuse of process for a party to attempt to induce, entice, coerce or otherwise improperly influence a witness or prospective witness in a Commission proceeding. *Citing, Chronicle Broadcasting Co.*, 19 FCC 2d 240, *rev. denied*, 23 FCC 2d 162 (1970); *Harvi Broadcasting Corp.*, 35 FCC 2d 94 (Rev. Bd. 1972) and *Kaye Smith Enterprises*, 98 FCC 2d 675 (Rev. Bd. 1984). Finally, Allegheny contends that the settlement interferes with Allegheny's right to obtain information for its petition to deny EZ's pending renewal application and may be violative of Section

73.3589 of our rules which restricts payments in exchange for refraining from filing a petition to deny or informal objection.

15. An abuse of process issue will not be specified. Section 73.3589 prohibits "payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection." Here there is no evidence that Randolph threatened to file a petition to deny or informal objection. Nor is there evidence that the payment to Randolph was in exchange for her agreeing not to file a petition to deny or informal objection. Moreover, while Allegheny is correct in its contention that an attempt to improperly influence a person with information would constitute an abuse of process, none of the cases cited by Allegheny support the conclusion that entering into an agreement to settle a civil suit, constitutes such an improper influence. Allegheny's contention that the settlement agreement infringes on its right to obtain the information it needs to successfully challenge EZ's license renewal is also without merit. Allegheny has the right to gather all the information concerning EZ that it can, consistent with the law. This it apparently has done. We fail to see how the settlement agreement has violated any of Allegheny's rights.

EZ's Petition to Dismiss or Deny

16. On December 6, 1991, EZ filed a petition to dismiss or deny Allegheny's application. In its petition, EZ claims that Allegheny's application is technically deficient and must be dismissed because it fails to provide protection to WOIO(FM), Mt. Vernon, Ohio, as required by Section 73.215 of the Commission's Rules. In its reply to Allegheny's opposition to its petition to dismiss or deny, EZ further argues that Allegheny's application should also be dismissed because it fails to protect a proposal to substitute Channel 228A for unoccupied Channel 223A at Barnesboro, Pennsylvania (MM Docket No. 87-433).⁷ EZ contends that because the Commission, in its *First Report and Order*, 4 FCC Red 4780 (1989), abolished the *Cameron Policy* which permitted challengers to specify an incumbent licensee's antenna site and technical facilities, challengers are no longer eligible for Section 73.213 processing.⁸ In its opposition, Allegheny notes that EZ's facilities are already short-spaced to WOIO by 36.2 km and that a grant of its application would reduce the short-spacing by 1.9 km. With regard to the Barnesboro proposal, Allegheny contends that it is only a proposed allocation and, as such, is not entitled to protection. Further, Allegheny argues that to deny Section 73.213 processing to renewal challengers would impermissibly impose disparate requirements on them that would create a pro-incumbent bias in comparative hearings. *Citing, Las Vegas Broadcasting Co. v. FCC*, 589 F.2d 594, 600 (D.C. Cir. 1978), wherein the court

⁶ We also note that "misrepresentations" reported in the arbitrator's decision and the court case were all made in the context of comedic skits which were broadcast as part of WBZZ's entertainment programming. We are disinclined to find that comments intended to be humorous, and which were broadcast with no intent to deceive the public constitute a "civil misrepresentation." See *Fox River Broadcasting*, 93 FCC 2d 137, 139 (1983), where the Commission held that misrepresentation necessarily includes an intent to deceive.

⁷ In an *Order to Show Cause*, 4 FCC Red 6939 (1989), the

Commission, by the Chief, Allocations Branch, changed the Barnesboro allocation to accommodate other modifications of the Table of Allotments.

⁸ Section 73.213(a) provides that, with respect to grandfathered short-spaced stations (stations on which the short-spacing existed as of November 16, 1964), a transmitter site or technical proposal may be modified so long as the proposed 1 mV/m contour "is not extended towards the 1 mV/m contour of any short-spaced station."

faulted the Commission for imposing an unreasonably strict financial qualifications standard on a renewal challenger.

17. We will not dismiss Allegheny's application as technically deficient. Here, Allegheny is seeking the license currently controlled by EZ. Our engineering study shows that the contours of EZ's existing station extend further in the direction of WOIO than do the contours of Allegheny's proposed station. Consequently, a grant of Allegheny's application would not result in an increase in radiation toward WOIO. Where a grant would not increase cognizable interference above and beyond that presently caused by the existing licensee the Commission will not dismiss or deny the challenger's application. See, *Royce International Broadcasting*, 2 FCC Rcd 1368 (1987). Moreover, while the Commission did eliminate the *Cameron* presumption in 1989, that presumption only related to the availability to a challenger of an incumbent licensee's facilities. By eliminating the presumption, however, the Commission did not change the challenger's right to have its application processed under the same standards as the incumbent's. In *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Stations Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5364 (1991), the Commission specifically stated that it would permit existing short-spaced licensees to relocate to another similarly short-spaced site, provided the current overlap is not increased. We agree with Allegheny that, under these circumstances, to preclude the processing of its application pursuant to Section 73.213 would create an impermissible bias in favor of the incumbent licensee. See *Las Vegas Broadcasting Co.*, *supra*. Allegheny's application, however, is short-spaced to the Barnesboro rule-making proposal. Here, Allegheny has requested Section 73.215 processing with regard to the Barnesboro proposal. Allegheny's Section 73.215 showing, however, did not include a request for waiver of the note to subpart (e) of Section 73.215 which states that the Commission will not accept applications that specify short-spaced antenna locations pursuant to this section where the proposed distance separation is less than the normally required distance separations in Section 73.207 by more than 8 km. Consequently, Allegheny is not in compliance with Section 73.215 with regard to the Barnesboro proposal. While Allegheny need not protect the Barnesboro proposal, FCC policy requires that, should that proposal be adopted, Allegheny would have to protect the allotment. Therefore, any subsequent grant of Allegheny's application shall be made contingent on the outcome of MM Docket No. 87-433. See, *Sieve P. Neville and Judy Crabtree*, 3 FCC Rcd 148 (Chief, Audio Services Division, 1988).

18. We note, however, that Allegheny is short-spaced to an allotment on Channel 229A at North Madison, Ohio. The *Report and Order*, 7 FCC Rcd 7163 (1992), for this allocation was released on November 5, 1992, and became effective December 21, 1992. Once the allotment became effective, Allegheny was required to eliminate the short-

spacing.⁹ Because the Allegheny application was filed before the release of the *Report and Order*, Allegheny will be given thirty days from the release of this Order in which to amend its application to eliminate the conflict with the North Madison, Ohio, allotment.

19. EZ further contends that Allegheny's application should be dismissed because it violates Section 73.316(b)(2) of our rules which prohibits the authorization of directional antennas that have a radiation pattern which varies more than 2 dB per 10 degrees of azimuth. Allegheny, however, on August 30, 1991, timely amended, *inter alia*, the engineering portion of its application to modify its directional antenna proposal. EZ, utilizing the relative field tabulations for Allegheny's new proposal, argues that Allegheny's application, as amended, is still in violation of Section 73.316(b)(2) of our rules. Finally, EZ contends, Allegheny failed to state that its antenna will be mounted "in accordance with specific instructions provided by the manufacturer," and that "no other antennas of any type are mounted on the same tower level as a directional antenna, and that no antenna of any type is mounted within any horizontal or vertical distance specified by the antenna manufacturer as being necessary for proper directional operation," as required by Sections 73.316(c)(5) and (c)(7) or our rules, respectively. In response, Allegheny contends that the Mass Media Bureau does not require the statements to be explicitly made in construction permit applications and that, in any case, the failure to include the statements would not warrant dismissal of its application.

20. Allegheny's application will not be dismissed for a violation of Section 73.316(b). Based on the relative field tabulations provided in its amendment, Allegheny's application would violate the 2 dB per 10 degree rule. However, this is not the case when compliance with the rule is calculated based on the more accurate ERP data also contained in the amendment.¹⁰ We will, however, require Allegheny to amend its application to provide the statements required by current Sections 73.316(c)(5) and (7) of our rules within thirty (30) days of the release of this Order.¹¹

21. EZ further contends that Allegheny failed to notify the Federal Aviation Administration (FAA) of its proposed tower construction even though Allegheny proposes an increase in power over that of the existing WBZZ facility and is within 20 nautical miles of Greater Pittsburgh International Airport. EZ contends that the Allegheny proposal, when combined with that of two other FM stations, would interfere with airport operations. Allegheny is proposing to mount its antenna on an existing tower which was cleared by the FAA (Study No. 76-EA-204-OE). Where applicants are proposing to locate on existing towers, the Commission does not require them to file for further clearance with the FAA.¹² See, Section 17.7 of the Commission's Rules which

⁹ We note that both the North Madison petition for rule making and the Allegheny application were filed prior to the effective date of *In re Matter of Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. pend.*

¹⁰ A defect will not render an application unacceptable for filing if the needed information can be derived, confidently and reliably, drawing on the application as a whole. See, *Coachella Valley Wireless Corporation*, 7 FCC Rcd 4252 (1992).

¹¹ FCC Form 301 does not specifically require the submission of these statements. Thus, the failure to supply them does not constitute an acceptability or tenderability defect which would require dismissal of Allegheny's application.

¹² EZ also contends that it does not appear feasible for Allegheny to locate its antenna on its proposed tower because of the location of other antennae on the tower and that, contrary to Allegheny's claim, the tower is neither FAA painted or lighted. Allegheny explains that it was informed by AT&T.

specifies those antenna structures which require FAA notification. In any case, the FAA has registered no objection to Allegheny's proposal.

22. Finally, EZ contends that Allegheny's environmental statement does not establish compliance with the American National Standards Institute (ANSI) guidelines for human exposure to RF radiation because it fails to consider the other radio transmitter facilities co-located at its proposed site. A study by the Mass Media Bureau's engineering staff shows that there are multiple contributors to radio frequency radiation at Allegheny's proposed tower site. Therefore, Allegheny is ordered to submit a certification that, before commencement of construction, an agreement will be in effect requiring all stations to reduce power or cease operations as necessary to assure worker safety with respect to radio-frequency radiation when maintenance is to be performed at the site.

23. The staff's engineering study also reveals that Allegheny's response to Question 14 of Section V-B of FCC Form 301, which seeks information concerning receiver induced intermodulation interference, is insufficient. Specifically our study reveals that there is the possibility that Allegheny's signal, when mixed with the signals of two other stations, WORD, Pittsburgh, and WMXP, New Kensington, Pennsylvania, would produce a signal which has a potential to cause receiver-induced intermodulation interference (RITOE) on the frequency of WLER(FM), Butler, Pennsylvania. Accordingly, Allegheny is ordered to investigate this matter and submit a statement to the presiding judge within thirty days of the release of this Order, specifically accepting full responsibility for the elimination of any objectionable interference (including that caused by receiver-induced or other types of modulation) to facilities in existence, facilities authorized, and radio receivers in use prior to grant of its application.

24. In addition to its allegations concerning Allegheny's engineering proposal, EZ claims that Allegheny's application should be dismissed or denied because Allegheny has no real interest in serving the needs of the Pittsburgh area. In fact, EZ contends, Allegheny's president, Herbert E. Long, Jr., a resident of northwest Washington, D.C. has been involved in two other applicants that filed renewal challenges against existing licenses which resulted in settlements.¹³ Allegheny's instant application, EZ notes, is represented by the same law firm that represented Long's other renewal challenges - the law firm of Cohen and Berfield. EZ charges that the Allegheny application is but one more in a long series of sham applications manufactured by this law firm for the purpose of extracting settlement payments from renewal applicants. In this regard EZ cites *WWOR-TV*, 6 FCC Rcd 4350 (A.L.J. 1991), *aff'd*, 7 FCC Rcd 636 (1992), appeal pending, *sub nom. Garden State Broadcasting Limited Partnership v. FCC*, No. 92-1065, (D.C. Cir. filed February 14, 1992) wherein an Administrative Law Judge refused to approve a settlement agreement between a renewal applicant and a challenger represented

by Cohen and Berfield after determining that the challenger had filed its application solely for the purpose of securing a settlement. In addition, EZ contends that Allegheny's counsel, Lewis Cohen, in investigating EZ, violated Pennsylvania law by knowingly examining and disseminating the record of a civil suit he knew to be under court ordered seal.

25. EZ's allegations do not warrant dismissal or denial of the Allegheny application. The fact that Allegheny's president was involved in two settlements does not establish that the Allegheny application was filed for an improper purpose. In this regard, we note that both settlements were in proceedings involving licenses held by RKO General, Inc. In the RKO cases, the Commission specifically encouraged the applicants to settle. *RKO General, Inc. (KHJ-TV)*, 60 RR 2d 1694 (1986); *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 3057 (1988). Similarly, we do not believe that the fact that Allegheny's law firm has filed a number of applications challenging the renewals of existing stations warrants the conclusion that Allegheny's application was filed for an improper purpose. See *Fresno Limited Partnership*, 6 FCC Rcd 6998, n.3 (1991), wherein we found such claims irrelevant in determining an applicant's *bona fides*. Moreover, even though we have concluded that an applicant represented by the law firm of Cohen and Berfield filed its application solely for the purpose of obtaining a settlement, that does not establish that Allegheny did so. In any case, prior to the time Allegheny filed its application, we changed our rules to eliminate the possibility of a renewal challenger profiting by settlement. *First Report and Order in BC Docket No. 81-742*, 4 FCC Rcd 4780 (1989). Thus, the motivation suggested by EZ does not appear applicable to Allegheny. Finally, the propriety of counsel's review of the record in the civil suit brought by Randolph (See paragraph 4, *supra*) is a non-FCC matter which we do not take cognizance of unless it is adjudicated by an appropriate trier of fact. *Policy Statement*, 102 FCC 2d at 1204-5. Moreover, we note that it does not appear that counsel committed any impropriety because the record was not under seal at the time of his review. (See footnote 2, *supra*).

26. ACCORDINGLY IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act or 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge, at a time and place to be specified in a subsequent Order, upon the following issues:

- (a) To determine which of the captioned mutually exclusive applications for authority to operate on Channel 229B at Pittsburgh, Pennsylvania, would, on a comparative basis, best serve the public interest; and

which owns and maintains the tower, that the tower would support its antenna and that the tower was in compliance with FAA paint and lighting requirements. In any case, Allegheny states that, should its proposed tower not be properly obstruction marked, it will take action to insure that it is before effectuating its proposal. We will not designate an issue concerning Allegheny's proposed tower.

¹³ Allegheny's application indicates that Long was the president, a director, and a 20.39 percent owner of Potomac

Broadcasting Corporation, an applicant that filed renewal challenges against *WGMS(AM)*, Bethesda, Maryland, and *WGMS-FM*, Washington, D.C., both of which were owned by RKO General, Inc. Allegheny's application also indicates that Long was a partner in *LBW Partnership*, a limited partnership that held a 13.75 percent interest in *Los Angeles Television Partnership* which twice filed applications challenging RKO General, Inc.'s license for *KHJ-TV*, Los Angeles.

(b) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted.

27. IT IS FURTHER ORDERED. That any construction permit awarded to Allegheny as a result of this proceeding shall be made contingent on the outcome of MM Docket No. 87-433.

28. IT IS FURTHER ORDERED. That in accordance with paragraph 18 hereinabove, Allegheny shall submit an amendment to its application to the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED. That in accordance with paragraphs 19 and 20 hereinabove, Allegheny shall submit the technical data required by Section 73.316(c)(5) and (c)(7) to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED. That in accordance with paragraph 22 hereinabove, Allegheny shall submit an amendment with the necessary certification to the presiding Administrative Law Judge within 30 days of the release of this Order.

31. IT IS FURTHER ORDERED. That the Petition to Deny the WBZZ license renewal application filed June 28, 1991, by Allegheny IS DENIED.

32. IT IS FURTHER ORDERED. That the Petition to Dismiss or Deny filed December 6, 1991, by EZ IS DENIED.

33. IT IS FURTHER ORDERED. That to avail themselves of an opportunity to be heard, the parties herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the release of this Order, file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issue specified in this Order.

34. IT IS FURTHER ORDERED. That the parties herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division

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SUMMARY

In its Petition To Deny WBZZ(FM)'s license renewal application, Allegheny Communications Group, Inc. ("ACNI") attempts to enlarge an unpleasant dispute that WBZZ(FM) had with a former employee into a referendum on the basic qualifications of EZ Communications, Inc., its licensee. ACNI has succeeded in raising only baseless claims that demonstrate that it is motivated not by the public interest but by its desire to harass EZ and advance its competing construction permit application.

ACNI's Petition is based solely on matters involved in an arbitration and two civil actions brought by WBZZ(FM)'s former news director against EZ and several station employees. The first action, a tort case, was settled while cross appeals of substantial issues going to the heart of the jury findings were still pending. Like the arbitration, the tort case did not involve any allegations relevant a Commission analysis of EZ's character. The second action, which alleged sex discrimination, was settled at the same time and after several days of an uncompleted trial.

From the torts involved in the first action, ACNI extrapolates claims of alleged news distortion and broadcast indecency. But no news material was involved in the torts alleged by Ms. Randolph. No one(except ACNI) has ever complained to the Commission about the remarks made during the WBZZ(FM) morning show in which Ms. Randolph participated. The Commission's policies against news distortion and indecency are wholly inapplicable here.

ACNI's contention that the WBZZ(FM) license renewal must be denied because of Ms. Randolph's unproven sex discrimination claim suffers from the same lack of support. ACNI's version of this sex discrimination claim, which has never been adjudicated and involved an unsettled and evolving area of the law, is based solely on broadcast banter among morning show colleagues that was intended to be comedic. The licensee's settlement of this suit certainly did not mean that it had merit, and the settlement does not reflect adversely on the EZ's qualifications.

Finally, ACNI's claims that the settlement with Ms. Randolph constituted a violation of the Commission's processes totally distorts the rules and policies that the FCC has recently adopted to curb filing abuses committed by parties who litigate only to receive a monetary pay-off. The Randolph settlement resulted in sealing of the court record, and releases with respect to future litigation. This settlement, which was adopted under court supervision, is not the type of action which the Commission's new abuse of process rules were intended to address. ACNI's attempt to interject the Commission into supervising the resolution of civil litigation--including EEO claims like Ms. Randolph's--might deter parties from ever bringing such actions for fear that the FCC's limits on monetary settlements would apply to such separate civil litigation.

None of ACNI's allegations are significant. EZ remains fully qualified to own and operate WBZZ((FM).